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No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., P. LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 21, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, pp. 1a-40a)[1] is not yet reported. The letter ruling of the Federal Communications Commission, dated June 2, 1967 (App. A, pp. 14-17) is reported at 8 F.C.C.2d 381, and the Commission's Memorandum Opinion and Order, dated September 8, 1967 (App. A, pp. 37-105) are reported at 9 F.C.C.2d 921.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1968. (App. B, pp. 41a-43a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission has ruled that all television and radio stations which carry routine product advertisements for cigarettes are obligated under the "Fairness Doctrine" to devote a "significant amount of time each week" to broadcasting the view that cigarette smoking is hazardous to health. The Court of Appeals, by a vote of 2 to 1, sustained the requirement. The questions presented are:

1. Has the FCC been granted statutory authority to adopt this requirement—more particularly, do the provisions of the Communications Act which empower the FCC to grant and renew broadcasting licenses as re-

[1] "App." refers to the separately-bound Appendix to this petition and the petitions in three related cases, forty copies of which have been filed with the Clerk of this Court. "J.A." refers to the Joint Appendix in the court below. "R." refers to the original record in the court below. Copies of both these documents also are on file with the Clerk of this Court.

quired by the "public interest, convenience or necessity" constitute a Congressional grant of authority to impose this regularly recurring obligation on licensees?

2. If authorized by statute, is the imposition of this obligation by the FCC on broadcasting stations consistent with the First Amendment when it would be clearly unconstitutional for any agency of government to impose a similar requirement on newspapers or magazines?

3. Was it arbitrary, capricious, and violative of due process of law for the FCC (a) to rule that the "Fairness Doctrine" applies to the product advertising of only one commodity—cigarettes—and (b) to render its decision without hearing any testimony or examining a single cigarette product advertisement?

4. Is the FCC's ruling applying the "Fairness Doctrine" to cigarette product advertising consistent with the Federal Cigarette Labeling and Advertising Act?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Sections 307(a) and (d), 309(a), 315(a), and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 73 Stat. 557 (1959), 47 U.S.C.

§§ 307(a),(d), 309(a), 315(a), 326; and Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282-84 (1965), 15 U.S.C. §§ 1331, 1333, 1334, 1339, are set forth in Appendix C, pp. 45a-49a.

STATEMENT

1. The Administrative Proceedings.

This case arose when John Banzhaf, a New York lawyer, wrote two letters on his own behalf in December 1966 to television station WCBS-TV in New York demanding that the station give him free broadcast time to reply to routine product advertisements for cigarettes. Banzhaf asserted that the "question of the advisability of smoking is clearly a controversial issue of public importance"; that "all cigarette advertisements" express a point of view on this issue; and that the station was obligated under the FCC's "Fairness Doctrine" to give free time to proponents of the anti-smoking viewpoint "roughly in proportion" to the time devoted to cigarette commercials. (J.A. 6, 7, 9.)

By letter of December 30, 1966, WCBS-TV rejected Banzhaf's request for free time on the grounds that it had presented broad and fair coverage concerning "the health ramifications of smoking" and that, in any event, the "Fairness Doctrine" was inapplicable to product advertising. (J.A. 11-13.) Thereupon, Banzhaf wrote to the FCC complaining that WCBS-TV had failed to comply with the "Fairness Doctrine." He enclosed copies of the correspondence between him and the station; no copies of any cigarette commercials accompanied the complaint. (J.A. 2-13.)

Although it is the FCC's professed practice when a "Fairness Doctrine" complaint is made to give the licensee notice and opportunity to reply,[2] the FCC did not do so in this case. Instead, on June 2, 1967, it sent WCBS-TV a letter, which it said constituted its ruling on the Banzhaf complaint, stating:

> "We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (App. A, p. 15.)

The FCC rejected Banzhaf's demand that anti-smoking advocates should receive free time "roughly approximate" to that used by cigarette commercials on grounds that such action would be "inconsistent with the Congressional direction in this field" provided in the Cigarette Labeling and Advertising Act. But it ruled that stations which carry cigarette commercials must "provide a significant amount of time . . . each week to cover the viewpoint of the health hazard posed by smoking." (*Id.*, pp. 15, 16-17.)

Following public release of this letter ruling—made without any notice or opportunity to be heard, either to WCBS-TV or any other interested party—petitions for reconsideration were filed by the present petition-

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[2] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416, 2 P & F RADIO REG. 2d 1901, 1905 (1964) (hereafter "Fairness Primer").

ers,[3] the National Association of Broadcasters, each of the three major networks, and a large number of other broadcasting and advertising groups affected by the decision. The various petitions stated, *inter alia*, that the FCC had no statutory authority to apply the "Fairness Doctrine" to product advertising and that, in any event, its application to cigarette advertising was foreclosed by the Cigarette Labeling Act. (See, *e.g.*, R. 352-67, 403-500.) On September 8, 1967, without having taken any evidence, the Commission issued a Memorandum Opinion and Order denying reconsideration and reaffirming its earlier ruling, which it expressly made applicable to all broadcast licensees. (App. A, pp. 37-105.)

In a lengthy memorandum, the Commission reviewed the background and purpose of the "Fairness Doctrine," which requires broadcast licensees to afford a reasonable opportunity for discussion of divergent views on controversial issues. (*Id.*, pp. 43-49.) The FCC defined the controversial issue invoking the "Fairness Doctrine" as follows: "that however enjoyable, such smoking may be a hazard to the smoker's health." (*Id.*, p. 39. See also *Id.*, p. 72.) The Commission ruled that cigarette advertisements by implication express a point of view on this issue, although the Commission acknowledged that it had not examined the text of any particular cigarette advertisement. (*Id.*, p. 81, n. 30.) The FCC brushed aside the points that cigarette

[3] Petitioner, The Tobacco Institute, Inc., a New York membership corporation, is a voluntary association of United States manufacturers of tobacco products, including six of the eight manufacturers which are petitioners. These eight cigarette manufacturer petitioners together account for nearly all the cigarettes manufactured in the United States. These manufacturers promote the sale of their cigarettes, among other means, by paid advertisements over radio and television.

commercials do not make any health claims and that claims that smoking is not hazardous have for many years been prohibited by the Federal Trade Commission. (*Id.*, pp. 59, 70, 92-93.)

The Commission found statutory authority for extending the "Fairness Doctrine" to routine product advertising in the obligation of licensees to operate in the "public interest" and in the ostensible adoption of the "Fairness Doctrine" by Congress in the 1959 amendment to Section 315 of the Communications Act, 47 U.S.C. § 315. (*Id.*, pp. 44-45, 48.) Constitutional attacks on the "Fairness Doctrine" were summarily rejected, largely on the authority of the decision of the Court of Appeals in *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967).

The Commission also reviewed the legislative history of the Cigarette Labeling and Advertising Act and various governmental reports relating to smoking and health and concluded that its "ruling is within our statutory authority and [is] not precluded by the Congressional policy embodied in the Labeling Act." (*Id.*, p. 66.) The Act provides, *inter alia*, that "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The Commission acknowledged that the Cigarette Act would preclude a regulation which would require either a cessation of cigarette advertising or the inclusion of a health warning in or adjacent to cigarette advertisments. (*Id.*, p. 49, 51.) But it concluded that the Act did not preclude it from requiring broadcasters under the "Fairness Doctrine" to allot "a significant amount of time" to anti-smoking advocates.

The FCC also stated:

> "[O]ur ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising." (*Id.*, p. 77.)

It rationalized this singling out of cigarette advertising on two grounds: (i) there are "governmental and private reports and Congressional action with respect to cigarettes"; and (ii) these assert that "'normal use of this product can be a hazard to the health of millions of persons.'" (*Id.*, p. 76.)

In response to the procedural objections to the manner in which it had arrived at its decision of June 2, the Commission said that its consideration of the pleadings filed after that decision satisfied the requirements of due process. It also stated that any procedural defect would be cured by giving its ruling only prospective effect. (*Id.*, pp. 80-82.)[4]

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[4] Two weeks following issuance of its opinion, the FCC received a request from a broadcaster, Metromedia, Inc., for "clarification" of a portion of its ruling. (R. 888.) In the course of its Memorandum Opinion, the FCC had stated:

> "We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming. *The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials.*" (App. A, p. 70.) (Emphasis supplied.)

On September 21, 1967, without prior notice to anyone, the FCC "withdrew" the italicized sentence and ruled that licensees are not required to present the views of responsible spokesmen in reply to broadcasts that cigarettes are hazardous to health. (*Id.*, pp. 106-08.) On December 21, 1967, the FCC denied the Tobacco Institute's Petition for Reconsideration of its September 21 ruling. (*Id.*, pp. 113-15.)

Commissioner Loevinger wrote a separate concurring opinion in which he expressed his "doubts that the [Commission's] action is procedurally and substantively consistent with controlling legal rules." (*Id.*, p. 93.) He found the FCC's affirmation of statutory authority for its action "most dubious"; warned that extension of the "Fairness Doctrine" to product advertising "is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable"; and said that "the Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health." (*Id.*, p. 96.) He concluded that the ruling was "the result of sentiment rather than conviction," but reluctantly concurred because he was "as persuaded as the Commission majority and its draftsmen that smoking is hazardous and injurious to the health of smokers." (*Id.*, p. 100.) Commissioner Johnson also wrote a separate concurring opinion taking issue with various points made by Commissioner Loevinger. (*Id.*, pp. 101-105.)

2. The Opinion of the Court of Appeals.

Upon review by the Court of Appeals for the District of Columbia Circuit under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, the FCC's ruling was upheld by a divided Court. (Bazelon, C. J. and Wright, J.; Miller, J. dissenting.)

The Court first rejected the contention that the FCC's ruling was foreclosed by the Cigarette Labeling Act. The Court said the FCC's ruling "does not violate the letter of the Act" since it does not require the inclusion of a warning "statement . . . in the advertising" itself. (App. B, p. 7a.) The Court justi-

fied this admittedly "relatively narrow reading of the Act" on the ground that the FCC ruling did not conflict with Congressional intent to protect cigarette manufacturers against conflicting requirements as to the content of cigarette advertising. (*Id.*, p. 13a.)

The Court went on to hold that the FCC is empowered to regulate the content of TV and radio programs by virtue of its authority under Sections 307(a) and (d) of the Communications Act to grant or renew broadcast licenses according to the "public interest, convenience, and necessity." (*Id.*, pp. 18-23.) The Court recognized that in view of First Amendment considerations the "public interest" is too vague a standard for administrative regulation of program content. (*Id.*, p. 24a.) It said, however, that the "'public interest' indisputably includes the public health," and consequently that the Commission may invoke this allegedly more specific standard to regulate the content of broadcasting. (*Id.*, p. 25a.) The Court added that "we are not prepared to say that the Commission is authorized to condemn every broadcast which might . . . be thought to pose some danger to the public health," but it expressed agreement with the FCC's position that "cigarette advertising presents a unique situation." (*Id.*, pp. 26a, 27a, n. 63, 30a.)

The Court acknowledged there was "considerable force" in the argument that the FCC's ruling violates the First Amendment, but it rejected the constitutional objection on the grounds that the Amendment applies differently to the broadcast media than to printed media; that the ruling would probably not inhibit any but "marginal" speech; that product advertising is not entitled to the same degree of protection as other

forms of speech; and that, even if "valued" speech were inhibited, the ruling is a proper device for balancing the relative financial resources of the adversaries on both sides of the smoking-health issue. (*Id.*, pp. 30a-38a.)

Finally, the majority ruled that it was proper for the FCC to issue its ruling without examining any actual cigarette advertisement, or any other evidence, even though it agreed that "as a general rule . . . more careful procedures are required to support innovation by an administrative agency." (*Id.*, pp. 39a-40a.)

Judge Wilbur K. Miller dissented, but he did not file an opinion.

REASONS FOR GRANTING THE WRIT

The present case—the first in which the "Fairness Doctrine" has been applied to routine product advertising—raises novel and important questions relating to the administration of the Communications Act and the constitutional limits on the FCC's authority to prescribe what must be broadcast over radio and television. The issues involved are of immense practical importance in the day-to-day operations of the FCC, the broadcasting industry, and for advertisers generally.

The novelty and far-reaching implications of the present ruling were perceived by the Commission and the Court of Appeals. The FCC recognized that its decision was "a precedent on an important issue" (App. A, p. 40); Commissioner Johnson in his concurring opinion noted this is "a case of landmark importance" (*Id.*, p. 101); and the Court of Appeals viewed the FCC's ruling as "a novel application" of the "Fairness Doctrine" and "an unusual limitation of the licensee's discretion." (App. B, pp. 15a, 16a, 24a.)

As the Court below stated, "except for the personal attack rules struck down by the Seventh Circuit [in *Radio Television News Directors Ass'n* v. *United States,* 400 F.2d 1002 (1968) *cert. granted,* No. 717, Jan. 13, 1969] we know of no case in which the Commission has so specifically defined the stations' duties under the fariness doctrine." (*Id.,* p. 16a.) The Court below also recognized that prior to the instant case "the Commission has been hesitant to invoke the fairness doctrine when a controversial issue is raised only by implication." (*Id.*)

With regard to application of the First Amendment, the ruling of the Court below that there is a "meaningful distinction" between the newspaper press and broadcasting, such as to justify sustaining an FCC regulation which would be clearly invalid if applied to the printed press, is in conflict with the Seventh Circuit's decision in *Radio Television News Directors Ass'n* v. *FCC, supra.*

The importance of the issues raised by the ruling in this case is underscored by this Court's recent grant of certiorari in two related cases, *Red Lion Broadcasting Co., Inc.* v. *FCC,* No. 2, and the *Radio Television News Directors* case, *supra.* Should the Court hold in those cases that the "Fairness Doctrine" or the FCC's "personal attack" rules thereunder are unauthorized by statute or in conflict with the Constitution, it would follow that the present ruling cannot stand. But even if the Court upholds the FCC in those cases, we submit for the reasons discussed below that the significantly farther-reaching ruling in this case would still be invalid. In any event, this case presents a striking added dimension to the issues raised by *Red Lion* and *News Directors,* and review of the

important questions in this complementary case is clearly warranted.

Furthermore, the FCC has now seized upon the decision of the Court of Appeals in this case as justification for an even more far-reaching assertion of authority. In a Notice of Proposed Rule Making adopted February 5, 1969, the FCC proposes to consider a rule completely prohibiting the broadcast of cigarette commercials by radio and television stations. (*In the Matter of Amendment of Part 73 of the Federal Communications Commission Rules with regard to the advertisement of cigarettes,* FCC Docket No. 18434.) The FCC specifically relies on the decision of the Court below for the proposition that the "public interest" standard of the Communications Act not merely authorizes but *requires* it to place an outright ban on cigarette advertising by broadcast licensees. Thus, the decision below has already had enormous consequences for the broadcasting, advertising, and tobacco industries.

In addition to the foregoing grounds for review, the FCC's arbitrary limitation of its ruling in the present case to the advertising of a single product—cigarettes—and its issuance of the ruling without advance notice to any interested party or any kind of hearing raise substantial questions concerning the standards which should be observed by an administrative agency in making a significant decision.

Finally, as we discuss below, the FCC's ruling conflicts with the regulatory scheme for cigarette labeling and advertising established by Congress in 1965 in the Cigarette Act. This case raises serious questions of first impression as to the meaning of that statute and its interrelationship with the Communications Act.

I. THE FCC'S RULING LACKS STATUTORY AUTHORIZATION.

The important threshold issue in this case is whether the FCC has statutory authority to issue the ruling in question.[5] The Commission minimized this issue, but the Court of Appeals devoted a large portion of its opinion to searching for a sufficient statutory basis for the FCC's action. (App. B, pp. 14a-30a.)

There is no statute which specifically authorizes the FCC to require licensees who carry routine cigarette commercials to devote a significant amount of free broadcast time every week to propagating the message that smoking is a health hazard. The only statutory foundations advanced by the majority below to support this concededly "unusual limitation of the licensee's discretion" are the general provisions of the Communications Act which, in the majority's words, "go no farther than to authorize [the FCC] to grant and renew broadcast licenses according to the dictates of the 'public interest, convenience and necessity.'" (*Id.*, p. 18a.)[6]

We submit this is an inadequate statutory basis for a far-reaching edict of a regulatory agency prescribing what must be broadcast over radio and television stations. This Court has made clear repeatedly that,

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[5] It is axiomatic that an administrative agency possesses "only such powers as are granted by statute. It may make only such orders as [its governing] Act authorizes." (Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 598 (1934).)

[6] The majority cited Sections 307(a) and (d) of the Communications Act of 1934, 48 Stat. 1083, 47 U.S.C. §§ 307(a), (d). These provisions, as well as Section 309(a), 48 Stat. 1085, 47 U.S.C. § 309(a), dealing with construction permits, and Section 315(a), 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), relied on by the FCC as statutory authority for the "Fairness Doctrine," are set forth in Appendix C, pp. 45a-47a.

"explicit [administrative] action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (*Greene* v. *McElroy*, 360 U.S. 474, 507 (1959). See also *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).)

As this Court's recent grant of certiorari in *Red Lion* and *News Directors* attests, the present case involves an "area of doubtful constitutionality." The FCC gave the First Amendment short shrift in this case,[7] but the Court of Appeals candidly acknowledged that the Commission's ruling raises serious constitutional problems. (App. B, pp. 31a-32a.) Nevertheless, in upholding the Commission, the majority of the Court below ignored the fundamental requirement of a clear legislative mandate for administrative regulatory activity trespassing into constitutionally sensitive areas.

Unlike the FCC—which was content to premise its authority solely on the "public interest" concept—the Court below flatly held that this amorphous standard was insufficient legislative support for the FCC's ruling. (*Id.*, pp. 24a-25a.) The majority incorporated a new regulatory standard into the Communications

[7] The FCC made no reference to the First Amendment in its June 2 letter ruling, and devoted only a brief paragraph to it in its Memorandum Opinion and Order. (App. A, pp. 42-43.) In its brief to the Court of Appeals, the FCC brushed off the First Amendment attack on its ruling as "well-nigh frivolous." (Brief for Respondents, p. 55.)

Act: the "public health." In effect, the majority read the statute as if it provided in substance as follows: "The Commission may require licensees to grant a significant amount of free time each week to spokesmen who oppose a point of view found to be implicit in product advertising if the product advertised is the subject of a controversy involving the public health." Such radical restructuring of the Commission's organic act is a function which must be left to Congress.[8]

In its original June 2 ruling, the FCC attempted to justify its decision as a straight-forward application of the "Fairness Doctrine." The doctrine, however, has always focused on the "discussion"—indeed the explicit "discussion"—of controversial issues.[9] To

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[8] Whenever Congress has intended to authorize the regulation of program content by the FCC—*e.g.*, restrictions on obscenity, profanity, lotteries, and deceptive contests, and the equal-time requirement for political broadcasts—it has always done so explicitly and has not relied upon the nebulous "public interest" standard. (See Communications Act, §§ 316, 326, 509, 48 Stat. 1088, 1091 (1934), as amended, 62 Stat. 763, 769 (1948), 74 Stat. 897 (1960), 18 U.S.C. §§ 1304, 1464, 47 U.S.C. § 509.)

[9] As the FCC acknowledged in its Memorandum Opinion, it has always previously "distinguished between explicit and implicit raising of controversial issues," applying the "Fairness Doctrine" only when the issue is raised explicitly. (App. A, p. 69, n. 21.) It recently applied this distinction in denying an atheist's request for time to respond to the advocacy of religion alleged to be implicit in the regular broadcasting of church services. (Miss Madalyn Murray, 5 P & F Radio Reg. 2d 263, 266-67 (1965).) The text and legislative history of the 1959 amendment to Section 315 of the Communications Act, which the FCC views as the Congressional endorsement of the "Fairness Doctrine," reveal that Congress also understood that the doctrine applies only to the explicit "discussion" of controversial issues. (See App. C, pp. 46a-47a; S. Rep. No. 562, 86th Cong., 1st Sess., p. 13 (1959); 105 Cong. Rec. 14446, 14458, 17830 (1959) (remarks of Senators Proximire, Hartke and Pastore).)

expand it to embrace the jingles and fantasies of many commercials—including the whimsical cigarette advertisements to which Banzhaf objected—distorts the doctrine beyond recognition. (See J.A. 2-3, 31-36.) From the time of the doctrine's first systematic formulation in the 1949 *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 25 P & F RADIO REG. 1901, until the present case, the FCC had never indicated in any way that the "Fairness Doctrine" is applicable to routine product advertising—and with good reason. The genesis and purpose of the doctrine was the FCC's concern with advancing public understanding of controversial issues by assuring full and balanced presentation and discussion of these issues.[10] It is an exercise in unreality to regard the ordinary commercial advertisement—urging the audience to buy this or that product—as containing a presentation and discussion of a viewpoint with respect to a public controversy.

II. THE RULING RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The ruling in the present case—which is significantly more restrictive of free speech than the FCC's "personal attack" rulings involved in *Red Lion* and *News Directors*—raises substantial First Amendment issues which merit consideration by this Court.

There is no doubt that the First Amendment would prohibit a governmental agency from requiring a newspaper or magazine which prints cigarette advertising

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[10] *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1249, 25 P & F RADIO REG. 1901, 1902, 1905 (1949); *"Fairness Primer," supra,* n. 2, 29 Fed. Reg. at 10416, 2 P & F RADIO REG. 2d at 1902; *In the Matter of Amendment of Part 73 of the Rules,* 10 P & F RADIO REG. 2d 1901, 1905.

to donate space—much less "a significant amount" of space "each week"—for the message that smoking is a health hazard. The FCC and the majority of the Court below sought to distinguish broadcasters from publishers on grounds of the need for technical regulation of the airwaves and the scarcity of broadcast frequencies. The ruling of the Court below on this point is squarely in conflict with the Seventh Circuit's decision in *Radio Television News Directors Ass'n, supra,* which invalidated the FCC's "personal attack and political editorial" regulations on First Amendment grounds.

As the Seventh Circuit properly ruled, it does not follow from the fact that the FCC must regulate the technical aspects of broadcasting that it may regulate program content. "[T]he traditions of the First Amendment do not evaporate because there is licensing. . . . The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license." (Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15, 37 (1967).) Moreover, whatever might have been said of the scarcity argument in the early days of radio, at present—with over 6,000 commercial broadcasting stations in operation and broad vistas opening up in the UHF band, community antenna systems, public broadcasting channels, and pay TV—the factual premise simply does not exist.

The present ruling goes far beyond the "personal attack" rules invalidated by the Seventh Circuit. Unlike the "personal attack" situation, which may occur

infrequently in practice and which requires the grant of a relatively small amount of free time, the ruling here imposes a continual, regular obligation on licensees and involves an appreciable amount of time. It forces stations to choose between two impermissibly restrictive alternatives: either they exercise self-censorship and refuse to broadcast any cigarette commercials, or they are compelled to devote substantial free time "each week" to the broadcasting of a particular message—that smoking may be a health hazard. That message is not simply whatever one who has been attacked in a broadcast wishes to offer in his own defense; rather, it is the "party line" which has been taken by some agencies of the federal government on the smoking-and-health issue, a position vigorously disputed by various responsible quarters of the scientific community.[11] (See, *e.g.*, S. Rep. No. 195, 89th Cong., 1st Sess., p. 3 (1965); App. A, p. 54.) The FCC has not merely established a duty to grant time; it has in effect prescribed the *content* of the broadcast. The notion that private broadcasters can be compelled to propagate the viewpoint of particular governmental agencies, at their own expense and under the threat of losing their valuable franchises, is totally repugnant to basic notions of free speech and a free press.[12]

The FCC's ruling cannot be saved from constitutional infirmity merely by asserting, as did the majority of

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[11] If certiorari is granted, petitioners reserve the right to argue, as they did before the FCC and the Court of Appeals, that if the FCC may validly require the broadcasting of messages proclaiming that smoking is hazardous, it must in fairness accord cigarette companies the right to reply.

[12] This dictation of required programming also contravenes the prohibition on censorship in Section 326 of the Communications Act. (App. C, p. 47a.)

the Court below, that it "probably" will not result in a "chilling" or reduction of cigarette advertisements. Since no evidence was taken in this case, there is nothing whatsoever in the record to support this premise. In any event, the argument misconceives the scope of the First Amendment. That provision protects the citizen not only against governmental prohibitions on what he wishes to say, but also against governmental dictation of what he must say. (See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).)[13]

Moreover, the FCC's recent proposal to ban cigarette advertising on radio and television altogether—in reliance on the authority purportedly established by the decision below—shows that the threat of governmental censorship in contravention of the Communications Act and the First Amendment is not imaginary but real and substantial. Emboldened by the decision in the present case, the FCC has now abandoned the pretense that it is merely concerned with furthering the public discussion and understanding of a controversial issue of public importance. It has now reached out for the role of censor and has flatly asserted that the First Amendment poses no barrier to

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[13] The Court below also mistakenly relied upon *Valentine* v. *Chrestensen*, 316 U.S. 52 (1943), and other cases suggesting that commercial advertising may be entitled to a lesser degree of protection under the First Amendment. Whatever the validity of this dubious proposition, it is wholly inapplicable in this case where the essential premise of the FCC's ruling is that broadcasting cigarette product advertisements is tantamount to discussing and "disseminating opinion" on a controversial issue—activities which are acknowledged in *Valentine* to be protected by the First Amendment. (See 316 U.S. at 54.)

its control over advertising on the nation's broadcasting media. (*In the Matter of Amendment of Part 73 of the Federal Communications Commission Rules with regard to the advertisement of cigarettes,* FCC Docket No. 18434, pp. 14-15.) Thus the "stealthy encroachment" on First Amendment rights represented by the decision below has already become an open assault. (See *Boyd* v. *United States,* 116 U.S. 616, 635 (1886).)

III. THE FCC'S RULING WAS ARBITRARY.

A. The FCC stated that its ruling "applies only to cigarette advertising, and imposes no fairness doctrine obligation upon petitioners with respect to other product advertising." (App. A, p. 77.) The Court of Appeals affirmed this ruling in a brief footnote. (App. B, p. 27a, n. 63.) We submit that singling out cigarettes for unique treatment in applying the "Fairness Doctrine" to commercial advertising is arbitrary. Such an abuse of agency and judicial power warrants correction by this Court.

The grounds relied on by the FCC and the Court below to differentiate cigarettes from other product controversies will not survive scrutiny. The existence of "governmental and private reports and Congressional action" is certainly not unique to cigarettes. There are controversies over the possible hazards of many products—*e.g.,* products containing cholesterol and fluorides, beer, wine, vitamins, proprietary drug products for colds, headaches, and insomnia, insecticides, and air travel—and many products and business activities have been the subject of reports and legislative action dealing with their relationship to health

or safety.[14] Automobiles are the most prominent recent example of a product which has been the subject of a major safety controversy; that controversy has generated a voluminous literature and produced the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. §§ 1381, *et seq.*

The FCC's other ground for distinguishing cigarettes—that reports on cigarettes assert that "normal use of this product can be a hazard to the health of millions of persons" (App. A., p. 76)—is equally defective. It is precisely the *normal* use of automobiles which is alleged to constitute the threat to public safety—the leading item of controversial literature charges that American automobiles are "Unsafe At Any Speed."[15] The same is true of many other products and business activities about which there have been significant public controversies. For example, it is the normal use of products containing cholesterol, alcoholic beverages, products containing fluorides, and airplanes which is said to constitute a danger to health

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[14] *E.g.*, Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301 *et seq.*; Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), as amended, 15 U.S.C. §§ 1261 *et seq.*; U.S. Dept. of HEW, *Alcohol and Accidental Injury* (1966); U.S. Dept. of HEW, *Diet, Cholesterol and Arteriosclerosis,* Heart Research News (Summer 1965); Public Health Service, 1966 National Dental Health Assembly (with emphasis on fluoridation) PHS Publication No. 1552 (1966); Report of President's Science Advisory Committee, *Use of Pesticides* (May 1953); R. Carson, *Silent Spring* (1962).

[15] R. Nader, *Unsafe At Any Speed* (1965). Similarly, as Commissioner Loevinger pointed out in his concurring opinion (App. A, p. 96), the normal use of automobiles is one of the primary causes of air pollution, which poses a threat not merely to the safety of users of automobiles and pedestrians, but to the health of the entire population in some localities.

or safety by many persons involved in the controversies over such products.

Why should the "Fairness Doctrine" be applied only to cigarette advertising, assuming that it may be applied to any advertising? The answer must be that the FCC has taken one side of the controversy over cigarettes and health, that it concluded that smoking is hazardous to health—although this is what the controversy is all about—and that it decided to take action against cigarette advertising in order to achieve what it presumes to be in the public interest.[16] As Commissioner Loevinger pointed out, however, "the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e., 'in the public interest')." (App. A, p. 96.) Once again, the Commission has failed to heed this Court's admonition, issued in connection with a previous effort of the FCC to read its own views of social policy into the law:

> "Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of [a governing statute] does not provide the remedy." *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 297 (1954).

B. The arbitrariness of the FCC's action in this case is underscored by the unprecedented and precipitate

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[16] Prior to the present case, it was a firmly established principle that, in applying the "Fairness Doctrine," the FCC had no authority to take sides in the controversy. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 924 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967); *Report on Editorializing, supra*, n. 10, 13 F.C.C. at 1255-56, 25 P & F RADIO REG. at 1911; *"Fairness Primer," supra*, n. 2, 29 Fed. Reg. at 10427, 2 P & F RADIO REG. 2d at 1925.

manner in which the ruling was promulgated. In the first place, despite the Commission's prior uniform rulings that its resolution of "Fairness Doctrine" issues must turn on a careful examination of specific facts,[17] the FCC in this case flatly refused to hear any evidence or examine even a single cigarette commercial. It simply asserted that *all* cigarette commercials, *per se*, present a position on the smoking-and-health issue. There is no evidence in the administrative record before the FCC to support this dictum. Moreover, contrary to its stated policy and practice in other cases (see n. 2, *supra*) and its procedural obligations under Section 4 of the Administrative Procedure Act,[18] the FCC handed down its initial ruling without first providing interested parties notice and an opportunity to be heard. The Commission's receipt of petitions for reconsideration did not remedy this defect. The FCC did not invite the presentation of evidence; it did not accord an oral hearing to any party. Having once committed itself, it could scarcely be expected to apply an independent judgment to the validity of its own prior action.

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[17] "*Fairness Primer*," *supra*, n. 2, 29 Fed. Reg. at 10416, 2 P & F RADIO REG. 2d at 1904; Capitol Broadcasting Co., 2 P & F RADIO REG. 2d 1104, 1107 (1964).

[18] Section 4(b) provides that:

> "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . ." 60 Stat. 239 (1946), 5 U.S.C. § 553(c).

It seems clear, as Commissioner Loevinger pointed out, that the Commission proceeded in this headlong fashion because it was "so eager to take its present position." (App. A, p. 94.) This Court should not sanction these procedures.

IV. THE FCC'S RULING CONFLICTS WITH THE PRE-EMPTIVE PROVISIONS OF THE CIGARETTE LABELING ACT.

This is the first case testing the meaning of the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, which significantly affects the vast interests involved in the growing, processing, manufacturing, distributing, and advertising of cigarettes, including the national and local governmental interests in tobacco tax revenues. The case is also one of first impression regarding the interrelationship of the Cigarette Act with the Communications Act of 1934.

We submit that the FCC and the Court below failed to accord proper scope to the pre-emptive provisions of the Cigarette Act. The Act, adopted in 1965 after extensive hearings on the smoking-and-health issue, makes a sharp distinction between the package label and advertising. It requires that a prescribed cautionary statement be placed on the package label of all domestically sold cigarettes, and precludes the requirement of any other statement on the package relating to smoking and health. (Sections 4, 5(a), 15 U.S.C. §§ 1333, 1334(a).) Regarding advertising, however, the Act provides that, prior to July 1, 1969, "No statement relating to smoking and health shall be required in the advertising of any cigarettes, the pack-

ages of which are labeled in conformity with the provisions of this Act." (Section 5(b), 15 U.S.C. § 1334(b).)[19]

The Cigarette Act represents a studied legislative compromise which was disrupted by the FCC's ruling in the present case.

First, as explained by Senator Cotton, one of the senior members of the Senate Commerce Committee, it was the Congressional intent "that at this time Congress should go only to the point of placing a plain and effective warning on each package of cigarettes, and that *any restriction in the matter of advertising in magazines and on television and elsewhere should be held in abeyance . . . .*" (111 Cong. Rec. 13899 (1965); emphasis supplied.) Congress clearly rejected the premise, which underlies the FCC's present ruling, that cigarette product commercials must be counterbalanced by other advertising with health-warning messages, and unequivocally determined that the pre-

[19] The fact that the provisions of the Act which affect the regulation of advertising terminate on July 1, 1969 (Labeling Act, Section 10, 15 U.S.C. § 1339) does not render this particular question unworthy of this Court's review. There are bills now pending in Congress which would extend the moratorium on the regulation of advertising. (*E.g.*, H.R. 3053, 6543, 6544 and 6545, 91st Cong., 1st Sess. (1969).) Moreover, under the FCC's ruling, all licensees have been in jeopardy of losing their licenses if, starting in September, 1967, they have not properly carried out the FCC's mandate. Indeed complaints seeking revocation of broadcasting licenses for alleged noncompliance with the present ruling are currently pending before the FCC. (See N.Y. Times, June 13, 1968, at 93, cols. 1-4; Wall Street Journal, June 13, 1968, at 12, cols. 3-6 (Eastern ed.).) Thus, even if the moratorium expires, serious consequences may still arise out of licensee conduct during its existence.

scribed cautionary notice on cigarette package labels constituted "adequate warning" of any health hazards that might be connected with cigarette smoking. (Section 2, 15 U.S.C. § 1331.)

Second, Congress intended to preclude "piecemeal" regulation of the smoking-and-health problem by various federal administrative agencies. Significantly, the FCC, when asked by the Senate Commerce Committee to express its views on pending bills, acknowledged its own limited jurisdiction and stated that it was "clearly appropriate . . . that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion," *i.e.,* cigarette advertising should not be regulated by an agency, such as the FCC, which has jurisdiction over only two of the various advertising media. (S. Rep. No. 195, 89th Cong., 1st Sess., p. 13 (1965).) The Court below minimized this representation to Congress by the FCC, saying that "while it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation." (App. B, p. 12a, n. 26.) The point is that the FCC knew that Congress was considering the question of regulating cigarette advertising; the FCC informed Congress that it did not believe it was the appropriate agency to deal with the matter; Congress adopted the "broad, across the board" regulatory approach suggested by the FCC; and as Commissioner Loevinger pointed out, "Congress was surely warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a 'piecemeal' attack upon the problem." (App. A, p. 98.)

The FCC acknowledges in its decision that the Cigarette Act precludes it from requiring a cessation of cigarette advertising on the air, or from requiring a health warning "in or adjacent to" cigarette commercials, or from ordering licensees to afford anti-smoking advocates time "roughly approximate" to that devoted to cigarette commercials—even though none of these prohibitions is expressly stated in the Cigarette Act. (App. A, pp. 15-16, 49, 51). It is clear that all these limitations on the FCC's power—as well as a restriction on the asserted power to require licensees to accord a "significant amount of time" to anti-smoking advocates—are required in order to effectuate the purposes of the Act.

The Court of Appeals justified its admittedly restrictive reading of the Cigarette Act on the ground that Congress did not intend to impede the flow of information to the public concerning the hazards of smoking. No one has argued that there was any such intent. The point is that there is no proof that Congress intended that regulatory agencies should be free to *compel* various parties to disseminate such information; the legislative history is to the contrary.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 1969